In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-907

THOMAS E. KEYSER, INDIVIDUALLY, AND D/B/A KEYSER TOWING COMPANY

AND

OSCAR SHEPARD, INDIVIDUALLY, AND HOLLENBECK TOW SERVICE, A CORPORATION, PETITIONERS

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners contend that the court of appeals erroneously construed the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. 201, *et seq.*, to apply to their towing operations which, they assert, are local and "retail" in character.

The Secretary of Labor brought these actions to enforce the overtime pay provisions of Section 7 of the Act, 29 U.S.C. 207, alleging that several of petitioners' employees had been denied overtime payments. The district court dismissed both actions, concluding that although petitioners were engaged in interstate commerce and therefore covered by the Act, they came within the Act's "retail sales or services" establishments exemption from overtime regulations (Pet. App. B-1—B-9).

The court of appeals affirmed the district court's finding that petitioners were engaged in interstate commerce, but reversed its holding that petitioners came within the Act's "retail sales and service" exemption, since petitioners did most of their business with and through the Los Angeles Police Department rather than the public at large (Pet. App. A7). The court therefore remanded the case to the district court for a determination whether the overtime pay provisions of the Act were in fact violated.

1. The district court and the court of appeals correctly held that petitioners are engaged in interstate commerce within the coverage of the Act. As the district court found, petitioner Hollenbeck's trucks and crews regularly tow and impound or assist vehicles which have been disabled or wrecked on major interstate highways passing through Los Angeles; petitioner Keyser's trucks and crews do the same on the Harbor Freeway, which "is so interconnected with interstate traffic through and around Los Angeles, that it constitutes an instrumentality of interstate commerce for the purposes of the Act" (Pet. App. B-3—B-4).

Petitioners' activities in keeping the channels of interstate commerce clear of disabled or wrecked vehicles is "so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it,' " *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 130. Following *Overstreet*, where this Court applied the Act to employees of a company engaged in maintaining a drawbridge which, unless properly serviced, would obstruct interstate transportation, numerous lower courts have applied the Act to employees of towing and wrecker services (such as petitioners') which help "maintain the road free from obstruction." *Crook* v. *Bryant*, 265 F.2d 541, 543

(C.A. 4); *Gray* v. *Swanney-McDonald, Inc.*, 436 F.2d 652 (C.A. 9), certiorari denied, 402 U.S. 995.[1]

In their Supplemental Brief, petitioners rely on *Gulf Oil Corp.* v. *Copp Paving Co.*, No. 73-1012, decided December 17, 1974, in which the Court held that a local manufacturer of concrete for road construction was not engaged "in [interstate] commerce" within the meaning of the Robinson-Patman and Clayton Acts since his only nexus with interstate commerce was manufacturing materials used in constructing roads on which interstate traffic would thereafter move. But that activity has a far less direct connection with interstate commerce than removing disabled and abandoned vehicles and wrecks directly impeding or endangering interstate traffic. Moreover, the Court's holding in *Gulf Oil* was based on the particular "purposes and legislative history" of the Robinson-Patman and Clayton Acts (slip. op. at 10), which foreclosed an expansive reading of the term "in commerce" as used therein (*id.* at 11). The Court expressly distinguished the Fair Labor Standards Act, noting "we are concerned in this case with significantly different statutes" (*id.* at 10). In contrast to the Robinson-Patman Act, the Fair Labor Stand-

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[1]See also *Snelling* v. *O.K. Service Garage, Inc.*, 311 F. Supp. 842 (E.D. Ky.); *Wirtz* v. *Robinson & Stephens, Inc.*, 20 WH Cases 765, 68 LC para. 32,708 (N.D. Ga.); *Hodgson* v. *Greenfield Auto Service*, 20 WH Cases 65, 65 LC para. 32,526 (W.D. Pa.).

The Act has been held applicable, on the same basis, to companies engaged in dredging navigable waters, *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F.2d 334 (C.A. 9); repairing, maintaining and lighting streets and runways at a military base, *Wirtz* v. *B.B. Saxon Co.*, 365 F.2d 457, 460, 462 (C.A. 5); *Wirtz* v. *R.E. Lee Electric Company*, 339 F.2d 686 (C.A. 4); and providing ambulance service for victims of automobile accidents occurring on interstate highways, *Duffy* v. *Oele*, 274 F. Supp. 307 (W.D. Mich.); *Wirtz* v. *A-1 Ambulance Service, Inc.*, 299 F. Supp. 197 (E.D. Ark.); *Kelly* v. *Ballard*, 298 F. Supp. 1301 (S.D. Calif.); *Barnes* v. *Silva*, 19 WH Cases 257, 61 LC para. 32,257 (N.D. Calif.); *Shultz* v. *Turley*, 19 WH Cases 239, 61 LC para. 32,253 (W.D. Ark.).

ards Act has been construed by this Court "to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce." *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 567; *Overstreet* v. *North Shore Corp.*, *supra*, 318 U.S. at 128.

2. The court of appeals correctly held that petitioners' business did not qualify for the "retail or service"[2] exemption provided in Section 13(a)(2) of the Act, 29 U.S.C. 213(a)(2).[3] The fact that petitioners transact business with the public is not dispositive since "not everything the consumer purchases can be a retail sale of goods or services." *Idaho Metal Works* v. *Wirtz*, 383 U.S. 190, 203; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295. Rather, the term "retail or service establishment" in Section 13(a)(2) refers to establishments "comparable to the local merchant, corner grocer or filling station operator * * *," *Roland Co.* v. *Walling*, 326 U.S. 657, 666; *Phillips Co.* v. *Walling*, 324 U.S. 490, 497, who, in responding directly to consumers, "need a greater flexibility in hours, wages, and conditions of employment than do those businesses dealing principally with other commercial establishments" (Pet. App. A6).

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[2]A "service" establishment "has the ordinary characteristics of a retail establishment except that it sells services instead of goods." *Fleming* v. *A.B. Kirschbaum Co.*, 124 F.2d 567, 572 (C.A. 3), affirmed *sub nom. Kirschbaum Co.* v. *Walling*, 316 U.S. 517.

[3]Section 13(a)(2) of the Act provides, in pertinent part, that

"(a) The provisions of * * * [Section 7] shall not apply with respect to—

* * * * *

(2) any employee employed by any retail or service establishment * * *. A "retail or service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry * * *."

As the court of appeals recognized, the great bulk of petitioners' services[4] are rendered at the request of the police. Petitioners serve as exclusive "Official Police Garages" and impounding stations in their designated areas (Pet. App. A2, A6-A7). Their work is performed under the supervision of the police department pursuant to departmental rules fixing rates and setting standards[5] adapted to police objectives, rather than to consumer needs (*ibid.*). Motorists normally do not request petitioners' services; indeed, they may not desire such services, particularly when their automobiles, found to have been obstructing traffic, are towed and impounded by petitioners. As the court of appeals stated, "[t]he vehicle owner's sole relationship to the towing company in the typical case is to pay the fee established by the Board of Police Commissioners in order to free his vehicle from impoundment" (Pet. App. A7). Thus, "[i]n both appearance and reality, these [petitioners] work hand in hand with the municipality in performing a service to the general public, often

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[4]It was stipulated that "almost all" of petitioner Keyser's calls were police requests, and substantially more than half of petitioner Shepard's calls were from the police (Pet. App. A6—A7).

[5]Towing trucks must be of certain color and bear official police garage (OPG) insignia, and must carry prescribed equipment. Truck drivers must wear standard OPG uniforms. Regulations also set minimum standards for storage lots, protection and handling of vehicles, and the safeguarding of property inside the vehicles. Each OPG is limited to a prescribed geographic area of operations in which it has a monopoly on police referrals. A training bulletin of the Los Angeles police states that an OPG is an agent of the police department. And truck drivers are commissioned Special Officers in the police department, required to report any criminal activity they observe (Pet. App. A2).

to the annoyance of the 'customer' whose car has been impounded" (*ibid.*). The court of appeals therefore correctly concluded that "[t]he companies' actual customer is the government" (*ibid.*).[6]

Exemptions to the remedial provisions of the Act are to be narrowly construed and to be allowed only upon a showing that the employer is "plainly and unmistakably within [the] * * * terms and spirit" of the exemption he claims. *Phillips Co.* v. *Walling, supra*, 324 U.S. at 493; *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392. Here, petitioners failed to sustain this burden.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

WILLIAM J. KILBERG,
Solicitor of Labor,

CARIN ANN CLAUSS,
Associate Solicitor,

JACOB I. KARRO,
JOHN K. LIGHT,
Attorneys,
Department of Labor.

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[6]Although the district court found that petitioners' services were recognized as retail "in the industry," the court of appeals correctly noted that "the industry itself must be one which Congress contemplated as falling within the 'retail concept'. *Wirtz* v. *Idaho Sheet Metal Works, Inc.*, 335 F.2d 952, 956 (9th Cir., 1964), aff'd, 383 U.S. 190 (1966)" (Pet. App. A5). The court of appeals made no conclusion regarding the retail nature of the automobile towing industry, but recognized that "towing services which derive a large proportion of their business from police calls are a distinct activity from those whose assistance is requested directly by the automobile owner" (Pet. App. A6).